

## FEDERAL CONSTRUCTION CONTRACT ACT

JUNE 27, 1952.—Ordered to be printed

Mr. McCARRAN, from the Committee on the Judiciary, submitted the following

### REPORT

[To accompany S. 2907]

The Committee on the Judiciary, to which was referred the bill (S. 2907) to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes, having considered the same, reports thereon, with an amendment in the nature of a substitute, and without recommendation except that if the Senate decides to legislate along the lines of this bill, the committee amendment represents the most apt language for this purpose.

#### AMENDMENT

On page 1, line 3, strike all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Federal Construction Contract Act of 1952".

SEC. 2. (a) No executive agency, acting either on its own behalf or on behalf of any other agency or corporation, shall award or enter into a construction contract upon a cost-plus-a-fixed-fee basis unless it shall be provided in such contract that all mechanical specialty work involved in the performance thereof shall be done by independent mechanical specialty subcontractors or by a contractor qualified to perform such mechanical specialty work and that, before any mechanical specialty work is commenced, the name of each of the independent mechanical specialty subcontractors or the contractor qualified to perform mechanical specialty work who is to perform any of such mechanical specialty work shall be submitted by the contractor to the procuring executive agency and approved by such agency.

(b) This section shall not be construed to forbid or prevent the contractor under a cost-plus-a-fixed-fee construction contract from himself performing any kind of mechanical specialty work under a contract awarded to or undertaken by him provided he is a contractor qualified to perform such mechanical specialty work.

(c) This section shall not be construed to apply to the following construction contracts:

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(1) Contracts to be performed outside of the continental limits of the United States which limits shall be deemed to include Alaska.

(2) Contracts in which the aggregate amount involved does not, or is estimated not to, exceed \$25,000.

(3) Any contract with specific reference to which the agency head determines that the procedure prescribed herein would result in undue delay and that the public exigency will not admit of the incident delay.

SEC. 3. (a) No executive agency, acting either on its own behalf or on behalf of any other agency or corporation, shall award or enter into a lump-sum construction contract unless (1) the names of the subcontractors who will perform all mechanical specialty work involved in the performance thereof, and if requested in the invitation to bid or otherwise by such executive agency, the names of the subcontractors who will perform such particular nonmechanical work involved in the performance thereof as such agency may specify in its request, and the cost to the contractor of the mechanical specialty work, and of such nonmechanical work as may be so specified by the contracting executive agency, to be performed by each subcontractor named, is set forth in any written bid submitted in connection therewith or, if there is no written bid, given in a written statement by the contractor to the contracting agency before such contract is awarded or made, and (2) the name of each such subcontractor designated in said bid or statement and the cost thereof to the contractor as set forth in the bid or written statement, is specified in the contract.

(b) This section shall not be construed to forbid or prevent any contractor from himself performing any part of the mechanical specialty work or any particular nonmechanical work as to which the contracting Federal agency requests the name of the proposed subcontractor, under a lump-sum construction contract awarded to or undertaken by him provided there is specified in the bid or written statement, and in the contract, as required by subsection (a) of this section, that the contractor will himself perform such part of the mechanical specialty work, or that particular nonmechanical work specified by the contracting agency in any such request, and the cost at which he will perform the same.

(c) No contractor under a lump-sum construction contract shall have any work performed by any person other than the contractor or subcontractor specified in the contract to perform the same, except in accordance with the provisions of subsections (d), (e), and (f) of this section.

(d) If a subcontractor specified in a lump-sum construction contract shall fail or refuse to perform or complete the work so specified to be performed by him in accordance with the terms of his subbid and/or subcontract therefor, the contractor may engage a substitute or different subcontractor provided he first submits in writing to the contracting agency the name and contract price of the substitute subcontractor.

(e) If a contractor under a lump-sum construction contract is able to secure or have performed any kind of work specified therein to be performed by a particular subcontractor, by a different or substitute subcontractor at a lower cost than the cost specified in his contract, the contractor may engage such substitute subcontractor: *Provided*, That he first submits to the procuring agency in writing the name of the substitute contractor and a copy of the proposed contract with such substitute subcontractor, and such substitute subcontractor is approved in writing by the procuring agency: *And provided further*, That in case of construction contracts made or awarded after bids pursuant to advertising, that such substitute subcontractor shall be one whose name was set forth as a proposed subcontractor in one of the bids filed pursuant to such advertising.

(f) In the event a contractor shall have work specified in his contract to be performed by a particular subcontractor, performed by a different or substitute subcontractor under paragraph (d) or (e) of this section, the total contract price of his lump-sum construction contract shall be adjusted by the full net difference in cost in the event such substitution shall result in a lower cost to the contractor than that specified for such work in the construction contract.

(g) No executive agency, acting either in its own behalf or on behalf of any other agency or corporation, shall award or enter into a lump-sum construction contract unless in addition to the requirements of subsection (a) hereof, the name or names of all sub-subcontractors who will perform mechanical specialty work thereunder and the cost of all such work to be performed by each such subcontractor shall be set forth in any written bid submitted in connection therewith, or if there is no written bid, given in a written statement by the contractor to the contracting executive agency before such contract is awarded or made.

(h) No contractor under a lump-sum construction contract shall have any mechanical specialty work performed thereunder by any sub-subcontractor other than one named therein as in subsection (g) of this section, unless and until the name or names of the different or substitute subcontractors and the contract price of the mechanical specialty work to be performed by each is submitted in writing to the contracting executive agency.

(i) This section shall not be construed to apply to the following construction contracts:

(1) Contracts to be performed outside the continental limits of the United States which limits shall be deemed to include Alaska.

(2) Contracts in which the aggregate amount does not, or is estimated not to, exceed \$25,000.

(3) Any contract with specific reference to which the agency head determines that the procedure prescribed herein would result in undue delay and that the public exigency will not admit of the incident delay.

SEC. 4. The Comptroller General or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of any contractor or subcontractor engaged in the performance of and involving transactions related to any such construction contracts.

SEC. 5. For the purposes of this Act—

(1) the term "executive agency" means any executive department or independent establishment in the executive branch of the Government including any wholly owned Government corporation.

(2) the term "construction contract" shall mean a contract for the erection, repair, moving, remodeling, modification, or alteration of any public building or public improvement and the erection, repair, moving, remodeling, modification, or alteration of any building or structure upon real estate intended for shelter, protection, comfort, convenience, or for production or processing including without being limited to, bridges, tunnels, dams, foundations, piers, abutments, viaducts, aqueducts, reservoirs, water supply projects, water control projects, water power development projects, hydroelectric development projects, disposal projects, transmission lines, locks, docks, jetties, and breakwaters.

(3) the term "mechanical specialty work" in connection with a construction contract means all plumbing, heating, piping, air conditioning, refrigerating, ventilating, and electrical work, including but not being limited to the furnishing and installation of sewer, drainage, water supply and distribution piping and plumbing, heating, piping, air conditioning, refrigerating, ventilating, and electrical materials, equipment, and fixtures.

(4) the term "contractor qualified to perform mechanical specialty work" means a "contractor" as herein defined who customarily performs himself and does not subcontract mechanical specialty work and who has and maintains a supervisory, administrative, and technical staff which has proven on previous construction work to be competent to supervise, control, and direct the kind of mechanical specialty work involved.

(5) the term "independent mechanical specialty subcontractor" means a person who as subcontractor undertakes with a contractor to do and does mechanical specialty work under a construction contract with independent financial responsibility to the contractor for administrative and technical supervision of mechanical specialty work and the completion thereon including the payment for labor and material thereon, and who has adequate tools and capital equipment and who has a technical staff which has proven on previous construction work to be competent to supervise, control, and direct the particular kind of mechanical specialty work involved.

(6) the term "contractor" means a person having a direct contractual relationship as prime contractor with an executive agency, acting either on its own behalf or on behalf of any other agency or corporation, for the performance of a construction contract.

(7) the term "person" means an individual, corporation, partnership, association or other organized group of persons. All references to contractor or subcontractor shall include individuals, corporations, partnerships, associations, or other organized groups of persons who are contractors or subcontractors.

(8) the terms "lump-sum contract" and "lump-sum construction contract" means a construction contract, whether awarded after bid or negotiated, under which the price is fixed or to be fixed by any method other than cost plus a fixed fee.

(9) the term "sub-subcontractor" means a person who undertakes with an independent mechanical specialty subcontractor to do and does mechanical specialty work under or pursuant to construction contracts provided for in section 3 of this Act.

Sec. 6. Nothing contained in this Act shall be construed to create any privity of contract between the United States Government or any agency thereof, and any subcontractor or sub-subcontractor under any construction contract, or to give any subcontractor or sub-subcontractor any cause of action against the United States or any agency thereof arising out of the failure of any person to comply with the provisions of this Act.

Sec. 7. Whoever, being a contractor for the performance of a construction contract, shall employ a subcontractor to perform work under a construction contract specified therein to be performed by a particular subcontractor, or whoever, being a subcontractor for the performance of mechanical specialty work under a construction contract, shall employ a sub-subcontractor to perform mechanical specialty work under such construction contract specified therein to be performed by a particular sub-subcontractor, other than the one named in such construction contract or one substituted in accordance with the terms of subsections (d), (e), or (h) of section 3 of this Act, shall be fined not more than \$5,000.

#### PURPOSE OF AMENDMENT

This amendment in the nature of a substitute is recommended by the subcommittee to meet several suggestions made by executive agencies and other witnesses who testified in connection with the bill. The substitute eliminates the requirement that the procuring agency estimate whether or not the mechanical specialty work is over or under \$5,000, and also eliminates the requirement that plans and specifications of mechanical specialty work on lump-sum contracts be made in advance.

General contractors do not normally find it necessary to secure subbids from subcontractors for work other than mechanical specialty work, and the cost of preparing subbids on mechanical specialty work is so much greater than for nonmechanical work that a differentiation is justified. At the hearings the General Services Administration raised the point that the proposed legislation should not be limited to these fields, and accordingly the substitute provides that each contracting agency shall have the discretion on any contract to extend the procedures prescribed by the bill to any field in addition to mechanical specialty work which it may believe appropriate in any case. It would appear that such extensions would be in order with respect to parts of the work which were expensive to estimate and on which the contractor would normally invite subbids.

The substitute also provides that mechanical specialty subcontractors be required to give the same protection to their own sub-subcontractors that they require from the general contractor, and accordingly the substitute extends the provisions of the bill to include sub-subcontractors in the mechanical specialty field.

The substitute revises the definition of mechanical specialty work in line with testimony of witnesses that it was more desirable to have the work defined as a unit rather than broken into three classes.

The amendment in the nature of a substitute adds two new sections to the bill. Section 6 makes it clear that nothing contained in the act shall create privity of contract between the United States and any subcontractor or give any subcontractor any cause of action against the United States on a Federal construction contract.

Section 7 is a penalty provision for violation of certain provisions of the act.



## PURPOSE

The purpose of the proposed legislation, as amended, is to improve existing practice and procedure in connection with Government construction contracts and to place such contracting on a more efficient basis. The proposed legislation accomplishes this first, by requiring general contractors operating under cost-plus construction contracts, who are not qualified by past experience to perform mechanical specialty work, to sublet such work to qualified mechanical specialty contractors, thereby insuring that the Government which is underwriting the cost of such construction shall have the work done by experienced contractors, and, second, with respect to lump-sum contracts, the bill is designed to remove one of the inequalities that exists under present procedure between subcontractors and general contractors. Under present practice, the general contractor who makes the low responsible bid to the Government is normally awarded the contract. However, subcontractors in the mechanical specialty field who must first bid to the general contractor have no assurance whatever that if their bid is the low responsible bid they will receive any contract, and the practice of "shopping" bids received from such subcontractors after the contract has been awarded to a general contractor is increasing on Federal construction projects to the extent that the Government is not getting the benefit of a full range of sub-bids.

## ANALYSIS

Section 2 (a) dealing with cost-plus contracts only, is designed to prevent a general contractor from undertaking at Government expense and without responsibility as to cost, mechanical specialty work, with which he has no previous experience and which he normally subcontracts to mechanical specialty contractors. The theory of this is that any responsible person who is willing to risk his own capital on a construction contract which he takes at a fixed price is entitled to undertake the performance of any part thereof, whether or not he is qualified by previous experience to perform the same cheaply, but that a person without previous experience and technical qualification in specialized mechanical work has no right to undertake such work on a cost-plus job and thereby gain his experience and know-how at public expense.

Section 2 (b) makes it clear that a general contractor who is qualified to do mechanical specialty work is not in any way prohibited from undertaking such work on a cost-plus contract as the result of this legislation.

Section 3 deals only with lump-sum contracts. It places no qualification requirements on contractors or subcontractors but is designed merely to eliminate the profit to the general contractors from shopping bids of their subcontractors after the award of contract has been made. Thus section 3 (a) requires the general contractor to list in his bid to the contracting agency the name of the subcontractors who will perform the mechanical specialty work and the cost to the general contractor of such work. The section also provides that at the sole discretion of the executive agency involved the name and the cost to the general contractor of the subcontractors who will perform the nonmechanical work may be required.

Section 3 (b) makes it clear that there are no restrictions whatever on the general contractor, in connection with lump-sum contracts, undertaking to do the mechanical specialty work or any other phase of the construction himself.

Section 3 (c) provides that no change may be made from the subcontractors named in accordance with subsection 3 (a) except as provided in the later subsections of section 3.

Section 3 (d) permits a general contractor who has named a subcontractor who subsequently fails or refuses to perform or complete his subcontract to substitute a new subcontractor with no restrictions whatever except that the new subcontractor and the contract price be specified in writing to the contracting agency.

Section 3 (e) provides that if a general contractor after award of contract desires to substitute a new subcontractor for the purpose of obtaining the work done at a lower cost, that the new subcontractor must be approved in writing by the procuring agency and that if the construction contract has been made after bids pursuant to advertising, such substitute subcontractor must be one whose name was set forth as a proposed subcontractor in one of the bids filed.

It will be observed that this section applies only where the general contractor of his own accord desires to substitute, after the award of contract, a subcontractor other than the one named in the general contractor's original bid for the purpose of obtaining a lower cost.

Section 3 (f) provides that in the event of a substitution under 3 (d) or 3 (e) the contract with the general contractor shall be adjusted so that the savings in cost inure to the Government.

Section 3 (g) requires mechanical specialty subcontractors who in turn are subcontracting part of their work to furnish the names of such subcontractors and the cost of such work in any written bid which they submit, or if there is no written bid, then in a written statement by the contractor to the contracting agency before such contract is awarded or made.

Section 3 (h) provides that no change may be made from the subcontractors named in accordance with subsection 3 (g) unless the substitute subcontractor and his price are first given to the contracting agency in writing.

Section 3 (i) contains exemptions thought to be desirable as to work to be done outside the continental limits of the United States, contracts which involve less than \$25,000 and contracts with specific reference to which the contracting agency head determines that the procedures would cause undue delay in face of a public exigency.

Section 4 is in accord with the objectives of Public Law 245 of the Eighty-first Congress, first session.

Section 5 contains definitions of the terms involved and it should be noted that the definitions of "contractor qualified to perform mechanical specialty work" in subsection (4) and of "independent mechanical specialty subcontractor" in subsection (5) are applicable only to section 2 of the bill dealing with cost-plus contracts as these defined terms are not used in section 3 of the bill dealing with lump-sum contracts.

Section 6 is included in the bill as amended as a matter of precaution and makes it clear that nothing contained in this act shall create privity of contract between the United States Government and any

subcontractor or give any subcontractor any cause for action against the United States on a Federal construction contract.

Section 7 is a penalty provision, for violation of certain provisions of the statute.

#### STATEMENT

The subcommittee designated to consider this proposed legislation held extensive hearings and received testimony from more than 50 witnesses. Testifying in support of this bill were numerous electrical contractors, plumbing contractors, heating, piping, and air-conditioning contractors, representatives of the National Electrical Contractors Association, the National Association of Master Plumbers, the Heating, Piping, and Air Conditioning Contractors National Association, the Sheet Metal Contractors National Association, the International Brotherhood of Electrical Workers and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry, both of the latter being craft unions of the American Federation of Labor. In addition, statements were filed in support of the bill by individuals and representatives of other groups in the contracting industry including the Massachusetts Electrical Contractors Association and the Construction Industry Association of Mobile, Ala. There were a number of witnesses testifying in opposition to the proposed legislation on behalf of the Associated General Contractors of America, Inc., and numerous statements were presented for the record by members of that association. Also appearing in opposition was a witness for the National Constructors Association. Representatives of the General Services Administration and the Army Corps of Engineers appeared at the hearings in opposition to enactment of the proposed legislation.

As a result of testimony adduced during the course of the hearings the committee is informed that electrical, plumbing, heating, air conditioning, and other so-called mechanical specialty work in connection with construction projects has become increasingly complex and that the efficient performance of such work requires trained and skilled personnel, expensive capital equipment, and a highly competent engineering staff. It was pointed out that on cost-plus contracts many general contractors who lacked the necessary experience, skill, capital equipment, and engineering know-how were undertaking to acquire it and set up their own mechanical specialty subdivisions at Government expense. Since these contractors' operating costs are paid by the Government under the terms of their contracts there is an inevitable tendency not to subcontract this work to the existing mechanical specialty contractors and the Government is losing the benefit of having this work done by experienced people. As a result, there has been in the past a waste of public moneys. It is unfortunate, particularly at this time, that able, experienced mechanical specialty subcontractors are available to do the job efficiently and at reasonable cost to the Government, but their experience and knowledge are not put to use for the benefit of the Government.

Witnesses appearing before the subcommittee generally agreed that the practice of bid-shopping is an evil that exists in the construction industry and is detrimental to the best interests of not only the industry itself, but the Government as well on Federal construction projects. Bid shopping is the continuation of negotiations between the general

contractor and the subcontractor after the former has been awarded the contract on the basis of a bid given him by the latter and has a virtual monopoly on the particular construction involved. After the award has been made, the bargaining positions of the general contractor who already has subbids in hand and the subcontractor are not equal and the subcontractor is at a decided disadvantage. The code of ethics of the General Contractors Association and the Handbook of the Institute of American Architects, as well as the codes of conduct of the subcontracting groups including the Trade Practice Rules for the electrical contracting industry promulgated by the Federal Trade Commission in 1931, contain strong admonitions against this practice. Witnesses agreed that the majority of contractors do not desire to indulge in this unfair practice. However, it is realized that the practice appears rather prevalent, particularly on Government construction projects, and the tendency appears to be increasing. This, obviously, will make it increasingly difficult for both the ethical general contractor and the ethical subcontractor to compete against those members of the industry who engage in bid-shopping. The inevitable result is to restrict the number of qualified subcontractors who are willing to participate in Government construction work, and it makes those who do participate put in their bids at the last minute and sometimes at an artificially increased figure to the distress of the general contractors.

Testimony was presented at the hearings of legislative efforts in a number of States including New York, New Jersey, Pennsylvania, Ohio, Arkansas, and North Carolina to eliminate bid shopping by mandatory separation of construction contracts into separate electrical, plumbing and heating contracts as well as a general contract and also of the separate bidding procedure provided by the Massachusetts statutes. Testimony was also presented as to the procedures for open subbids prescribed by the NRA codes when they were in existence.

The following Government agencies submitted reports on the instant bill: Department of Defense, Department of Interior, Department of Justice, General Services Administration, Comptroller General of the United States, and the Federal Trade Commission. Generally, these agencies, in expressing opposition to the proposed bill, stated that the bill places an added administrative burden upon Government agencies without conferring any corresponding benefits upon the Government.

The committee therefore reports this bill without recommendation except that if the Senate decides to legislate along the lines of this bill, the committee amendment represents the most apt language for this purpose.

The reports submitted by the interested departments in connection with this bill are on file with the committee.